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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-5731

MICHAEL GENE BERRYHILL,

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

# PETITIONER'S REPLY TO RESPONDENT

I. Respondent argues that "[t]he only way for the trial judge to respond, without lying and without harming Petitioner, was not to give an answer to the question." Respondent's brief at 9.

That is clearly wrong. The proper instruction for the judge is spelled out in the dissenting opinion. Berryhill v. State, 235 Ga. 549, 557-58 (1975). The judge should have noted that the jury had been instructed as to those factors which they should and could consider in deciding whether to sentence the defendant and they should make that determination according to the instructions given them in the charge and without regard to other matters not referred to in the charge.

As the dissenting justices noted, the effect of the judge's response was to inform the jury that he could not give a "yes" answer to the question. Berryhill, 235 Ga. at 557. The line of reasoning of the three dissenting justices might have run as follows: It would not be unreasonable to assume as a juror that if the judge could have answered the question "Yes" [you may sentence Mr. Berryhill to life imprisonment without possibility of parole] that he would have done so. That would have given the jury the information they wanted and from their point of view, there is no reason the judge would not so instruct them if that were the correct answer. Since he did not do so, but instead is reported to have said, "I cannot answer that question," the inference is that the answer must be "No" [a life sentence will not guarantee that he will not be paroled]. Having received their answer, the jury came back with a sentence of death.

Of course, the possibility of parole is the function of the Board of Pardons and Paroles in Georgia, and not the function of the jury. See Ga. Code Ann. § 2-3011 and § 77-501 et seq.

In conclusion, the judge's response was not only improper but clearly harmful. Viewing the matter another way, for example, the response might have had a much different character had the judge said, "I cannot answer any questions." Once he focused on a particular question, however, the message conveyed is much different.

II. The second point that needs to be made is that one tends to assume what the judge said, although, in fact, no one knows for sure since there is no sworn testimony on the point. Further, it was the bailiff, not the judge, who actually spoke to the jury.



The distinction is an important one because even a slight difference in wording can make a great deal of differnce in the message conveyed, as illustrated by Petitioner's first argument above. Thus, any uncertainty should weigh in favor of the defendant since the inadequacy of the record is not attributable to him.

Respectfully submitted,

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